Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

RICHARD WILSON and ALWIN SMITH
Petitioners,

v.

JOHN HARVEY MILLER and
DEBBIE TUCKER LOVELESS
Respondents.

Supplemental Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

JOHN HARVEY MILLER and DEBBIE TUCKER LOVELESS	§ §	
Plaintiffs,	§ §	
v.	§ §	6:95cv982
RAINS COUNTY, TEXAS, ET AL.	§ §	
Defendants	§	

ORDER

On the day came on to be considered *Defendants' Motion for (Summary Judgment* (Docket No. 30) and *Motion for Summary Judgment of Defendant Frank Long* (Docket No. 50). After careful consideration, the Court is of the opinion that the following Order should issue.

In ruling on a motion for summary judgment, the Court must determine whether there exist any genuine issues of material fact as to the plaintiffs'

claims. *Anderson v. Liberty Lobby,* 106 S.Ct. 2502, 2510 (1986). The summary judgment evidence must be weighed in the light most favorable to the non-movant, here the plaintiffs. *Id.*

The defendants' motions are based on the statute of limitations, absolute prosecutorial immunity, qualified immunity, and lack of county policy which led to constitutional deprivations.

ANALYSIS:

Statute of Limitations:

Each of the defendants move for summary judgment on the issue of whether the statute of limitations bars the plaintiffs' claims. The Court has addressed the statute of limitations defense in a previous order dated March 27, 1997. In that order, this Court held that the plaintiffs' claims for malicious prosecution were not barred by the two-year statute of limitations because Texas Rule of Appellate

Procedure 231 makes a decision of the Texas Court of Criminal Appeals final fifteen days from the ruling if no motion for rehearing is filed. The plaintiffs' applications for writ of habeas corpus were granted on December 15, 1993. Accordingly, the decisions on the writs became final on December 30, 1993. The plaintiffs filed their Original Complaint on December 22, 1995, within the two-year limitations period. Therefore, the plaintiffs' § 1983 claim for malicious prosecution is not barred by the defendants' limitation defense.

Absolute Immunity:

Defendants Alwin Smith and Frank Long base their respective motions on absolute prosecutorial immunity. Normally, a prosecutor is entitled to absolute immunity for the prosecution of a criminal case. *Imbler v. Pachtman*, 424 U.S. 409 (1976). However, a prosecutor who engages in investigatory

functions normally carried out by the police cannot claim absolute immunity but must instead rely on qualified immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269-270 (1993). A review of the evidence reveals that genuine issues of material fact exist on the issue of whether these defendants engaged in such investigatory functions normally performed by police officers.

The affidavits on file and the *Plaintiffs' First Amended Original Complaint* state that both the district attorney and the assistant district attorney joined in searches of the plaintiffs' home and land. Summary judgment should accordingly be denied on the issue of absolute immunity so that the trier of fact may resolve the issue.

Qualified Immunity:

Since the defendants' motions are also based on the defense of qualified immunity, the Court must

analyze the plaintiffs' claim that the defendants violated a clearly established constitutional right. *Siegert v. Gilley*, 111 S.Ct. 1789 (1991). The defendants will be entitled to immunity for their actions if they "acted in an objectively reasonable manner in view of the existing law and facts available to [them]." *Lampkin v. City of Nacogdoches*, 7 F.3d 430,435 (5th Cir. 1993).

Lampkin made it clear that the question of qualified immunity should normally be answered as a matter of law without the aid of the jury. *Id.* However, the Fifth Circuit went on to note that where the underlying facts necessary to decide the immunity issue are controverted, determination by the trier of fact is necessary. *Id.* Such is the case here.

Summary judgment would not be proper here, since material facts are in dispute as to the Defendants' claims of qualified immunity. "It is not

the function of the trial judge, in ruling on a motion for summary judgment, to weigh evidence, assess credibility, or determine the most reasonable inference to be drawn from the evidence. Those are functions of the trier of fact." *Honore v. Douglas*, 833 F.2d 565 (5th Cir. 1987), *citing Anderson v. Liberty Lobby*, 106 S.Ct. 2505 (1986). The Court would be performing those very functions if it were to grant the defendants' motions. The Court finds that material fact issues exist with regard to the defendants' claim of qualified immunity. Summary judgment should be denied as to defendants Sheriff Wilson, Alwin Smith, and Frank Long on the defense of qualified immunity.

County Liability:

Finally, Defendant Rains County moves for summary judgment due to the plaintiff's failure to show that the alleged wrongful act was taken pursuant

to official county policy. To establish county liability, the plaintiff must demonstrate a policy or custom which caused the constitutional deprivation. *Colle v. Brazos County, Texas*, 981 F.2d 237, 244 (5th Cir. 1993). A county cannot be held liable simply because it employs a tortfeasor and respondeat superior is insufficient to establish liability for the acts of non-policy-making employees. *Id.* An official policy can be shown by pointing to a policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the officers or by an official with policy-making authority. *Id.* At 244-45. The plaintiff fails to show that any policy of the county or its policy-making officers led to the alleged constitutional violations. While the sheriff is clearly a policy maker, the plaintiff fails to show that any policy of the sheriff led to the deprivations alleged. The summary judgment evidence fails to

establish the existence of a material fact with regard to county policy. Therefore, the county is entitled to summary judgment.

CONCLUSION:

Defendants' Motion for Summary Judgment (Docket No. 30):

Genuine issues of material fact remain with regard to whether Defendant Alwin Smith is entitled to absolute immunity. Likewise, genuine issues of material fact remain with respect to the qualified immunity of Defendants Alwin Smith and Sheriff Richard Wilson. Since these fact issues must be resolved by a jury, the defendants' motion must be denied with respect to their immunity defenses. Summary judgment should also be denied as to the statute of limitations defense. *There is no genuine issue of material fact with regard to Rains County's*

liability and summary judgment for the county should be granted.

Motion for Summary Judgment of Defendant Frank Long (Docket No. 50):

Genuine issues of material fact remain with regard to whether Defendant Frank Long is entitled to absolute immunity. Similarly, fact issues remain as to whether qualified immunity shields Defendant Frank Long. Therefore, summary judgment must be denied with respect to the immunity defenses asserted by Frank Long. Summary judgment should be denied on the defendant's assertion of the statute of limitations defense. It is therefore

ORDERED that *Defendants' Motion for Summary Judgment* (Docket No. 30) is **GRANTED in Part.** It is further

ORDERED that the *Motion for Summary Judgment of Defendant Frank Long* (Docket No. 50) is **DENIED.**

SIGNED this 30th day of September, 1997.

_____
UNITED STATES DISTRICT JUDGE